



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OFFICE OF
ECOSYSTEMS, TRIBAL AND
PUBLIC AFFAIRS

June 10, 2010

Ms. Carrie McEnteer
Directorate of Public Works
ATTN: IMPA-FWA-PWE (C. McEnteer)
1060 Gaffney Road, #4500
Fort Wainwright, Alaska 99703-4500

Re: EPA comments on the Resumption of Year-Round Firing Opportunities at Fort Richardson, Alaska, Draft EIS, EPA Project #07-042-DOD

Dear Ms. McEnteer:

The U.S. Environmental Protection Agency (EPA) has reviewed the U.S. Army Garrison Alaska (USARAK) **Draft Environmental Impact Statement (EIS) for the Resumption of Year-Round Firing Opportunities at Fort Richardson, Alaska** (CEQ# 20100073). Our review of the draft EIS was conducted in accordance with our responsibilities under National Environmental Policy Act (NEPA) and Section 309 of the Clean Air Act. Section 309 specifically directs the EPA to review and comment in writing on the environmental impacts associated with all major federal actions.

The draft EIS was prepared to evaluate the potential environmental effects associated with the USARAK proposal to strengthen unit preparedness and improve Soldier and Family quality of life by maximizing live-fire training opportunities at Fort Richardson, Alaska. The Eagle River Flats (ERF) area has been restricted to winter-only firing since the determination that white phosphorus (WP) was causing substantial bird mortality. A CERCLA Record of Decision (ROD) was developed in 1998 to clean up or cap remaining WP in the ERF. These activities will be completed this year. The USARAK is now proposing to resume live-fire training at Fort Richardson. In addition to evaluating the resumption of year-round live-fire training at ERF (Alternative 2), the USARAK has evaluated the No Action alternative (maintaining status quo) and the development of a new site (Alternative 3-South Post location). The USARAK has identified Alternative 2 as its preferred alternative.

We commend the USARAK for providing a well-organized, straightforward document that is generally easy to read. We also recognize the efforts of the USARAK to involve the potentially affected public in a meaningful and collaborative dialog of the potential impacts of this project. In addition, we believe the range analysis which produced a second action alternative at Fort Richardson was rigorous and a robust effort to develop additional alternatives in compliance with the intent of NEPA. We do have serious concerns, however, with the potential environmental impacts associated with both action alternatives presented in the EIS. We elaborate on these concerns in the detailed comments that follow. We also recommend that

additional data and analysis be provided on the No Action alternative such that agencies and the public can easily discern and compare the potential consequences of all alternatives.

Because of our concerns, we have rated the draft EIS EC-2 (Environmental Concerns-Insufficient Information). A summary of our rating is enclosed. We are particularly concerned with the potential impacts to water quality, wetlands, Cook Inlet beluga, salmon stocks, shorebirds, other waterfowl, wildlife, recreation, visual resources, environmental justice (EJ), sensitive human populations, and commercial, recreation and subsistence fishing activities associated with the action alternatives. Although the preferred alternative (Alternative 2) could cause moderate impacts to several of these resources, we believe that overall it is environmentally preferred when compared to Alternative 3, particularly with respect to the development of an additional range in a relatively pristine area of the Post. In general we recommend that a rigorous monitoring program be implemented to clearly identify the actual impacts associated with the implementation of approved activities, along with a comprehensive adaptive management strategy to provide clear direction and flexibility to adjust the program based on the results of monitoring and mitigation implementation. We believe rigorous monitoring is also needed in order to demonstrate continued compliance with the CERCLA ROD goals and Remedial Action Objectives (RAOs).

Finally, we recommend that additional information be provided regarding the impacts associated with the No Action Alternative. Currently, it is not possible to fully compare the impacts to all valued environmental components (VECs) of the No Action and action alternatives. This information should include impacts to water quality, air quality, wildlife, aquatic resources, noise, visual, and vegetation for the current areas of training and associated activities. We recognize that some of this information may be available in other NEPA documents but for ease of comparison and full disclosure, we recommend that this information be incorporated into, or be specifically cited in the final EIS.

We appreciate the opportunity to provide comments on this draft EIS. If you would like to discuss our comments, please contact Jennifer Curtis of my staff in Anchorage at (907) 271-6324 or by electronic mail at curtis.jennifer@epa.gov.

Sincerely,



Christine B. Reichgott, Manager
Environmental Review and Sediments Management Unit

Enclosures

**EPA DETAILED COMMENTS ON THE DRAFT EIS FOR
RESUMPTION OF YEAR-ROUND FIRING OPPORTUNITIES AT
FORT RICHARDSON, ALASKA**

Evaluation of the No Action Alternative

During agency discussions, we recommended the analysis and/or disclosure of impacts relating to the "off post" live-fire training of Fort Richardson Soldiers. We believe this information is needed in order to present a clear contrast of potential impacts of the No Action alternative with Alternatives 2 and 3. Sec. 1502.14 of the CEQ regulations require that the EIS "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public." This includes the impacts of the No Action alternative. We recommend that the final EIS clearly identify the impacts associated with "no action", including but not limited to, impacts to water quality, air quality, wildlife, aquatic resources, noise, visual, vegetation, health, and safety associated with the current use of Donnelly and Fort Wainwright. This information should be presented in a format similar to that used for the comparison of the impacts associated with the action alternatives.

CWA Section 404 and Least Environmentally Damaging Practicable Alternative

In our October 3, 2007, scoping comments we recommended that the USARAK determine if the indirect discharge of material caused by the displacement of that material by munitions impact and/or detonation could be subject to Section 404 (404) of the Clean Water Act (CWA). This issue was also identified in scoping comments submitted by Cook Inlet Keeper. There is no discussion in the draft EIS about the applicability of Section 404 to the alternatives. We recommend that the USARAK work with the Army Corps of Engineers to complete a jurisdictional determination. If 404 does not apply, it should be addressed in the draft EIS in response to comments received during the scoping process. If 404 is applicable, we recommend that the final EIS include information to clearly identify the preferred alternative as the Least Environmentally Damaging Practicable Alternative (LEDPA). We also recommend that the final EIS include a draft 404(b)(1) analysis.

Maintenance of the CERCLA RAOs and Monitoring

As the agency responsible for implementing CERCLA and as a signatory to the 1998 CERCLA ROD, we are very concerned that the ROD cleanup goals and RAOs are maintained should year-round live-fire be resumed in ERF. While we support the goals of the environmental monitoring plan outlined in Appendix J of the draft EIS, we recommend that additional details, such as monitoring schedule and frequency, be provided in the final EIS. We believe that it is preferable that the forward observers and those conducting monitoring be independent of the Army and recommend that the USARAK commit to this independent analysis in the final EIS or EIS ROD. We also would appreciate more specific information on the criteria and process that the USARAK will use to coordinate with the US Fish and Wildlife Service (FWS) to "seek advice" as necessary to determine waterfowl migration periods. We believe the final EIS should provide additional information on what type of circumstance would cause the Army to seek advice; what the coordination mechanism will be with the FWS; and what will determine the beginning and end of a migration period. We also recommend that monitoring under Alternative 2 be identified for all target areas, not just those that have known or suspected WP. Finally, we

recommend that USARAK identify and incorporate specific adaptive management strategies into the proposed monitoring program to provide flexibility to meet these objectives into the final EIS. This could be accomplished by including a draft adaptive management plan in the final EIS.

Risk of Wildland Fire

The draft EIS discusses in general terms the risk of wildland fire associated with the action alternatives, in particular Alternative 3. There has been tremendous concern in the last several years of the possibility of a wildland fire in the mountainous area between Eagle River and Hillside. While a wildland assessment was completed in 2004, and is referenced in the draft EIS, the recent spruce bark beetle kill and other environmental changes in the area lead us to recommend that more current information on this topic be included in the final EIS. Specifically we recommend that USARAK coordinate with the Anchorage Fire Department and Chugach State Park and Forest Service personnel to determine if the 2004 analysis is still adequate. We also recommend that USARAK coordinate with these entities to develop a comprehensive wildland fire response plan to ensure a timely response to such an incident if Alternative 3 is selected in the ROD.

Water Quality and Aquatic Resources

We have concerns relating to the potential impacts to water quality associated with both action alternatives. For Alternative 3, we are particularly concerned with any potential for the activities proposed in Alternative 3 to impact Snowhawk Creek, a tributary to Ship Creek and a secondary drinking water source for Anchorage. We are also concerned about the potential for sediment transport from munitions impacts to steep gradient side slopes. For Alternative 2, in addition to potential redistribution of WP, we are also concerned with the potential for additional munitions contaminants and sediments to enter Eagle River and its tributaries. We recommend that the final EIS clearly demonstrate that both alternatives will comply with antidegradation requirements of the CWA as well as demonstrate that the project will not cause exceedences for drinking water quality standards.

Impacts to EJ and Sensitive Populations

Based on the information presented in the draft EIS, it appears that substantial numbers of low income and minority populations reside in the East Anchorage area, which could be impacted by activities associated with Alternative 3. There are also several schools, including at least two elementary schools (Muldoon Elementary and Susitna Elementary), and several elder care/assisted living facilities (former Mary Conrad Center, now Prestige Care and Rehabilitation Center of Anchorage, Marlow Manor, Chester Park, Inn-Tegrity, Cedar Point, etc.). In comparison, Alternative 2 appears to have fewer numbers of disadvantaged residents and no apparent sensitive receptor locations, particularly if noise impacts are reduced through the removal of the three easternmost firing points. Based on this, it would appear that Alternative 3 would affect EJ populations to a greater extent than Alternative 2. However, there is currently no information to determine if the EJ populations present in the Muldoon area would be disproportionately impacted. We recommend that an analysis be completed to determine if low income or minority persons would experience greater impacts than the remainder of the residents in the area as required by Executive Order 12898. For example, it could be that these residents are more likely to live in mobile homes (such a Glencaren Court or Rangeview) or other

structures that are not as well insulated and therefore more likely to experience greater noise impacts from the live-fire training.

In addition, there is no socioeconomic information for residents residing on Fort Richardson. Presumably, there are low income and minority residents on Post. If these populations could be impacted by this project, particularly with regard to mental health impacts associated with the No Action alternative, this should be discussed in the final EIS.

Cumulative Effects Analysis

In our review of the cumulative effects section, we found no discussion relating to the Fire Island wind farm project. Because of that project's potential impact to bird populations, we recommend that it be considered in the cumulative effects analysis, particularly if the same populations could be impacted by both projects.

Habitat Protection Buffer Areas

Currently the buffer areas as proposed result in borders which will may be difficult for soldiers to avoid or maintain. We recommend that the USARAK consider smoothing out the borders resulting in straighter borders that can be more easily complied with. We are also concerned about the likelihood that soldiers will be able to avoid the buffer areas in areas where there are small "doughnut holes" between buffer areas. Because of the likely increase of unintentional firing into buffer zones when aiming for these doughnut holes, we recommend that the USARAK eliminate these areas for potential targets altogether.

We also recommend that the buffer areas exclude not only the "target area," but also the "weapon system (or munitions) impact area" shown on Figure 2.2c to better minimize the likelihood of ordnance impacting within the buffers and either re-exposing WP or causing direct adverse impacts to waterfowl. We believe this is particularly important since targeting of areas immediately adjacent to the buffers would occur when birds are present, and possibly in large numbers.

Impacts to Recreation

Currently the impact area proposed in Alternative 3 experiences substantial use by hikers and other recreationalists, particularly in the warmer seasons. Because of the safety issues associated with live-fire training, we are very concerned that the mitigation measures proposed for Alternative 3 may not be adequate to prevent potential injury to these users. We recommend that the USARAK work closely with user groups and organizations to determine adequate measures to avoid and mitigate any potential safety issues associated with recreational users.

Specific Comments:

Cover Pages:

Currently Volume 2 has a different title from the other volumes. We recommend that the title for Volume 2 be revised to be consistent with the other volumes.

Executive Summary, Mitigation tables:

These tables appear to include mitigation that is not applicable to the Alternative referenced in the column. For example, on page ES-10, #1 proposed mitigation

measure for Alternative 3 does not seem appropriate as restricting navigation in Eagle River will not impact the South Post area under Alternative 3. We recommend that this table be revised to include only those current or proposed mitigation that apply to the alternative under which it is listed.

Chapters 3 & 4:

We recommend that the final EIS include discussion in the Affected Environment and Environmental Consequences regarding what, if any, changes the Joint Basing will have on this project, particularly if the preferred alternative is selected. We are particularly interested in any plans for changes to the proposed use for the impact areas, responsibility for monitoring, and funding for additional remedial action should this become necessary.

Chapter 4:

We recommend discussion relating to the potential impacts associated with the use of hexachloroethane, particularly as it relates to the waterfowl.

Appendix A:

We recommend a figure that depicts the correlation between WP hotspots and the habitat protection buffer areas be included in the final EIS.

Appendix A:

We recommend a map identifying noise zones for firing points associated with Alternative 2 be included in the final EIS.

**U.S. Environmental Protection Agency Rating System for
Draft Environmental Impact Statements
Definitions and Follow-Up Action***

Environmental Impact of the Action

LO – Lack of Objections

The U.S. Environmental Protection Agency (EPA) review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

EC – Environmental Concerns

EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce these impacts.

EO – Environmental Objections

EPA review has identified significant environmental impacts that should be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no-action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

EU – Environmentally Unsatisfactory

EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potential unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to the Council on Environmental Quality (CEQ).

Adequacy of the Impact Statement

Category 1 – Adequate

EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis of data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

Category 2 – Insufficient Information

The draft EIS does not contain sufficient information for EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the action. The identified additional information, data, analyses or discussion should be included in the final EIS.

Category 3 – Inadequate

EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of the action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. EPA believes that the identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. EPA does not believe that the draft EIS is adequate for the purposes of the National Environmental Policy Act and or Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. On the basis of the potential significant impacts involved, this proposal could be a candidate for referral to the CEQ.

* From EPA Manual 1640 Policy and Procedures for the Review of Federal Actions Impacting the Environment. February, 1987.

EPA's Section 309 Review: The Clean Air Act and NEPA

Office of Federal Activities (2251A)

Quick Reference Brochure

ENVIRONMENTAL REVIEW AND THE CLEAN AIR ACT

The Clean Air Act, a law to prevent pollution of a single environmental medium, contains an unusual provision. That provision is Section 309, which authorizes the Environmental Protection Agency (EPA) to review certain proposed actions of other federal agencies in accordance with the National Environmental Policy Act (NEPA) and to make those reviews public. If the proposing agency (the "lead" agency) does not make sufficient revisions and the project remains environmentally unsatisfactory, EPA may refer the matter to the President's Council on Environmental Quality for mediation. (See Highlight A.)

HIGHLIGHT A: Section 309 of the Clean Air Act

(a) The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this Act or other provisions of the authority of the Administrator, contained in any (1) legislation proposed by any Federal department or agency, (2) newly authorized Federal projects for construction and any major Federal agency action (other than a project for construction) to which Section 102(2)(C) of Public Law 91-190 [*] applies, and (3) proposed regulations published by any department or agency of the Federal government. Such written comment shall be made public at the conclusion of any such review.

(b) In the event the Administrator determines that any such legislation, action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality.

[*] NEPA (42 USC 4332(2)(C) et seq.)

Section 309 originated in 1970, the year in which landmark national legislation created new agencies and new requirements for restoring and protecting the environment. Besides NEPA and its creation of CEQ, the National Oceanic and Atmospheric Administration (NOAA) and EPA were established, and, at the end of 1970, the Clean Air Act was passed. At that time, many issues of environmental consequence were brewing (see Highlight B), one of which--the proposed supersonic transport aircraft (SST)--became a crucial test of NEPA. (See The National Environmental Policy Act section, below.)

The lead agency for the SST project, the Department of Transportation (DOT), chose not to disclose EPA's comments on the NEPA-required environmental impact statement (EIS) before having issued its final decision, construing NEPA to contain no explicit public disclosure requirements. Although later CEQ regulations under the Act would clarify this ambiguity, the Congress had a vehicle at hand in which to make its point: the draft Clean Air Act. Senator Edmund Muskie, sponsor of Section 309, said to the Senate when submitting the conference report, that as soon as EPA has completed its review of a proposed action, it must make its written comments public, and "not when the environmental impact agency decides the public should be informed." (116 *Cong. Rec.* S-20602, Dec. 18, 1970)

HIGHLIGHT B: When NEPA Was New: 1970-1971 Issues

- o Trans-Alaska oil pipeline and the North Slope-Valdez route
- o Supersonic transport aircraft
- o Cross-Florida Barge Canal
- o Clearcutting "areas of scenic beauty" in national forests
- o Tennessee-Tombigbee Waterway
- o Dredging and filling in wetlands
- o Calvert Cliffs (MD) nuclear power plant

To correct another ambiguity of NEPA, Section 309 places the requirement to review EISs upon EPA because NEPA "does not assure that Federal environmental agencies will effectively participate in the decision-making process. It is essential that mission-oriented Federal agencies have access to environmental expertise in order to give adequate consideration to environmental factors." (*Sen. Rept.* No. 91-1196, 91st Cong., 2d Sess. 43, 1970) Consequently, EPA has reviewed most of the approximately 25,000 draft and final EISs produced since the passage of NEPA.

Section 309 confers upon EPA broad review responsibilities for proposed federal actions. (See Highlight C.) The EPA Administrator has delegated responsibility of national program manager to the Office of Federal Activities (OFA), and to the ten EPA Regional Administrators for review of regional specific actions. OFA has developed a set of criteria for rating draft EISs. The rating system provides a basis upon which EPA makes recommendations to the lead agency for improving the draft. If improvements are not made in the final EIS, EPA may refer the final EIS to CEQ. (See sections on The National Environmental Policy Act and Referrals, below.)

HIGHLIGHT C: Materials Which EPA Reviews Under Section 309 Authority

- o Proposed legislation
- o Proposed regulation
- o Environmental assessment (EA)
- o Environmental impact statement (EIS), draft and final
- o Any proposal that the lead agency maintains does not require an EIS but that EPA believes constitutes a major federal action significantly affecting the environment so as to require an EIS.

Figure 1: EPA's Criteria for Sec. 309 Review of Impact Statements

Rating Environmental Impacts:

LO--Lack of Objections

EC--Environmental Concerns--Impacts identified that should be avoided. Mitigation measures may be required.

EO--Environmental Objections--Significant impacts identified. Corrective measures may require substantial changes to the proposed action or consideration of another alternative, including any that was either previously unaddressed or eliminated from the study, or the no-action alternative).

Reasons can include:

- o violation of a federal environmental standard;
- o violation of the federal agency's own environmental standard;
- o violation of an EPA policy declaration;
- o potential for significant environmental degradation; or,
- o precedent-setting for future actions that collectively could result in significant environmental impacts.

EU--Environmentally Unsatisfactory--Impacts identified are so severe that the action must not proceed as proposed. If these deficiencies are not corrected in the final EIS, EPA may refer the EIS to CEQ. Reasons, in addition to impacts identified, can include:

- o substantial violation of a federal environmental standard;
- o severity, duration, or geographical extent of impacts that warrants special attention; or,
- o national importance, due to threat to national environmental resources or policies.

Rating Adequacy of the Impact Statement:

- 1 (Adequate)--No further information is required for review.
- 2 (Insufficient Information)--Either more information is needed for review, or other alternatives should be evaluated. The identified additional information or analysis should be included in the final EIS.
- 3 (Inadequate)--Seriously lacking in information or analysis to address potentially significant environmental impacts. The draft EIS does not meet NEPA and/or Section 309 requirements. If not revised or supplemented and provided again as a draft EIS for public comment, EPA may refer the EIS to CEQ.

(See Selected Publications, below: EPA's Policy and Procedures for the Review of Federal Actions Impacting the Environment.)

Annually, OFA and its regional counterparts review about 500 EISs and some 2000 other actions (see Figures 1 and 2). Among the variety of proposed actions that may be reviewed, besides that for which an agency provides an impact statement, are: legislation proposed by a federal agency; a proposed agency regulation; the renewal of an action originally approved before the enactment of NEPA; a proposal for which an agency has determined that no impact statement is needed, whether or not the agency has published a Finding of No Significant Impact (FONSI); and, an action that is actually a segment of either a program or a reasonably expected succession of actions that could result in a cumulative negative impact on human health or welfare or the environment.

In addition to conducting environmental reviews, OFA develops guidance materials and provides training courses on NEPA and Section 309 requirements for EPA regional staff, and promotes coordination between EPA offices and other federal agencies.

THE NATIONAL ENVIRONMENTAL POLICY ACT AND CEQ

The National Environmental Policy Act (NEPA, 42 *USC* 4321 et seq.) was enacted on January 1, 1970 in recognition of the widening influence on the human and natural environment that individual federal agency actions can exert. With its stated purpose (see Highlight D) and with heightened public awareness of environmental quality questions, NEPA makes its goals and policies "supplemental to those set forth in existing authorities of Federal agencies" (NEPA, Section 105). In this way, the agencies' authorizing statutes were amended to include NEPA requirements.

Title I of NEPA requires the federal government to use all practicable means to preserve and maintain conditions under which human beings can coexist with the natural world in productive harmony. Section 102 directs federal agencies to lend appropriate support to initiatives and programs meant to anticipate and prevent degradation of world environmental quality. Further, this section requires federal agencies to incorporate environmental considerations in their decision-making, using a systematic, interdisciplinary approach.

Title II of NEPA establishes the Council on Environmental Quality (CEQ, or the Council). Two months after enactment of NEPA, the President issued Executive Order 11514 authorizing CEQ to guide the Sec. 102 process. Under this order, the Council immediately published guidelines, followed in 1978 by regulations (40 *CFR* Parts 1500-1508) requiring all Federal agencies to issue NEPA regulations consistent with CEQ's. Advisory to the President, CEQ conducts studies, prepares the annual Environmental Quality Report to Congress, and reviews EISs. Moreover, CEQ mediates interagency disputes concerning environmental analyses of matters of national importance. (See Referrals section, below.)

HIGHLIGHT D: The Purposes of NEPA

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

(PL 91-190, 42 *USC* 4321 et seq.)

As evidence of compliance with the NEPA Section 102 provisions for a proposed major action that could significantly affect the environment, CEQ requires the lead agency to prepare a detailed written statement addressing NEPA concerns, i.e., an EIS (40 *CFR* Part 1501). The lead agency may first prepare an environmental assessment (EA), which is a concise public document (40 *CFR* Part 1501.3) that determines whether an EIS or a FONSI (40 *CFR* Part 1501.4(e)) should be prepared. An EA is not necessary, however, if the agency has decided at the outset to prepare an EIS.

For review, the lead agency provides the EIS to those federal agencies having statutory jurisdiction or special expertise, as well as to appropriate other federal, state, and local agencies; Indian tribes, when the proposed action might impact tribal lands; and, the interested or affected public (40 *CFR* Part 1503.1). Once the EIS is final, the lead agency must file it formally, simultaneously making it available to the public, together with the reviewers' comments and the lead agency's responses to those comments (40 *CFR* Part 1506.9). The CEQ regulations designate EPA the official recipient of all final EISs, which responsibility the EPA Administrator delegates to OFA.

REFERRALS TO THE COUNCIL ON ENVIRONMENTAL QUALITY

The "predecision referrals" provision (40 *CFR* Part 1504) enables any federal agency under NEPA to refer another agency's final EIS to CEQ during the 30-day waiting period before a lead agency can proceed with the action. On the other hand, Section 309 authorizes EPA to refer to CEQ a broader range of federal activities, not only actions for which EISs are prepared. The CEQ regulations (40 *CFR* 1504.1(b)) implement Section 309 of the Clean Air Act, acknowledging that EPA has been assigned more extensive review and referral authority than the other agencies (see Highlight C).

Within 25 days after the lead agency has made the final EIS available to the public, the referring agency must provide early notification to that agency about its intention, and make its referral in writing to CEQ. The lead agency, once it has received written notification from CEQ, is to respond in writing within 25 days. During that same period, other agencies and the public may submit written comments to CEQ. Then CEQ may publish Findings and Recommendations; mediate between the disputing agencies; hold public meetings or hearings; refer irreconcilable disputes to the Executive Office of the President for action; or, conclude either that the issue is not of national importance or that insufficient information has been submitted upon which to base a decision.

In the time since the referral process was formally established in 1973, agencies have referred a total of 24 proposed federal actions to CEQ. Of these, EPA was responsible for 15, of which one was referred jointly with the Department of the Interior (DOI). (See Figure 2 for EPA regional environmental review offices.) So far, in no case has CEQ made a formal referral to the Office of the President. Most often, CEQ has issued Findings and Recommendations. In a few cases the lead agency has withdrawn the proposal, and in three cases CEQ determined that the issue was not a matter of national importance.

In 1989, CEQ upheld EPA's Section 309 referral authority. At issue was a DOI Bureau of Reclamation proposal to renew longterm water contracts for irrigation operations of the Friant Unit in the Central Valley Project of California. The reason for referral was that no EIS had been prepared on the contract renewals, which individually and in the aggregate were likely to result in unsatisfactory environmental effects. In response, DOI questioned EPA's right to challenge the agency's decision that no EIS was needed. In rejecting that argument, CEQ established a precedent, that is, affirmed that EPA may identify a major federal action significantly affecting the environment, even though the lead agency disagrees.

**Figure 2: EPA'S REGIONAL
SECTION 309 REVIEWERS**

REGION 1 : (617) 918-1051
Office of Environmental Review
JFK Federal Bldg.
Boston, MA 02203-0001

REGION 2 : (212) 637-3504
Envir. Planning & Protection
290 Broadway
New York, NY 10007-1866

REGION 3 : (215) 814-2705
Envir. Programs Branch
1650 Arch Street
Philadelphia, PA 19106

REGION 4 : (404) 562-9611
Office of Envir. Assessment
61 Forsyth Street
Atlanta, GA 30303

REGION 5 : (312) 886-9750
Federal Activities program
77 West Jackson Blvd.
Chicago, IL 60604-3507

REGION 6 : (214) 665-7451
Office - Planning & Coordination
1445 Ross Avenue, Suite 1200
Dallas, TX 75270-2733

REGION 7 : (913) 551-7148
Environmental Review
726 Minnesota Avenue
Kansas City, KS 66101

REGION 8 : (303) 312-6228
Ecosystem Protection Program
999 18th Street, Suite 500
Denver, CO 80202-2466

REGION 9 : (415) 744-1584
Office of Federal Activities
75 Hawthorne Street
San Francisco, CA 94105

REGION 10 : (206) 553-8574
Ecosystems & Communities
1200 Sixth Avenue
Seattle, WA 98101

SELECTED PUBLICATIONS

Caldwell, Lynton K., *Science and the National Environmental Policy Act; Redirecting Policy Through Procedural Reform*. University of Alabama Press, c1982.

Congressional Record, vol. 166, p. S-20602 (Dec. 18, 1970).

Healy, Martin, "The Environmental Protection Agency's Duty to Oversee NEPA's Implementation: Section 309 of the Clean Air Act," *Environmental Law Reporter*, 3 ELR 50071 (1973).

Liroff, Richard, "The Council on Environmental Quality," *Environmental Law Reporter*, 3 ELR 50051 (1973).

Policies and Procedures for the Review of Federal Actions Impacting the Environment. U. S. Environmental Protection Agency, Office of Enforcement, Office of Federal Activities, Pub. No. 1640 (rev. 1984).

Procedures for Implementing the Requirements of the Council on Environmental Quality on the National Environmental Policy Act. U. S. Environmental Protection Agency, 40 CFR Part 6.

Rand, Sally and Tawater, Mark Steven, *Environmental Referrals and the Council on Environmental Quality*. Washington, D. C., Environmental Law Institute, 1986.

Regulations For Implementing the Procedural Provisions of the National Environmental Policy Act. U. S. Executive Office of the President, Council on Environmental Quality, 40 CFR Parts 1500-1508 (reprint, as of July 1, 1986). Contents include: the National Environmental Policy Act of 1969, as amended in 1975; the Clean Air Act, Section 309; and, Executive Order 11514, as amended by Executive Order 11991.

Senate Report No. 91-1196, 91st Congress, 2nd Session, p. 43 (1970).